

ASSOCIATE GENERAL COUNSEL
OFFICE OF THE GENERAL COUNSEL
FIRST DRAFT 06-21-02

MEMORANDUM

TO: BEN ANDERSON

FROM: JOHN GENTRY

SUBJ: FAMILY PRIVACY PROTECTION ACT(FPPA), S. C. Code 30-2-10 *et. seq.*

DATE: June 21, 2002

On May 5, 2002 the Governor signed the subject law. The law requires that agencies: limit collection of personal information to that necessary to fulfill a legitimate public purpose; promulgate and publish the agency's privacy policy; advise the citizen at the time of collection that the personal information is subject to public scrutiny or release; take reasonable steps to ensure that no person or private entity obtains or distributes personal information obtained from a public record for commercial solicitation; provide notice to each requestor of records that obtaining and using public records for commercial solicitation directed to any person in this state is prohibited; and makes certain exceptions for specified, limited purposes. Additionally the law prohibits any person or private entity from knowingly obtaining or using personal information obtained from a public body for commercial solicitation directed to any person in this state and provides a criminal penalty for violation. {Commercial solicitation means contact by telephone, mail, or electronic mail for the purpose of marketing a consumer product or service. [30-2-30 (3)] Consumer product or service is not defined nor is private entity.}

As you know, under FERPA an educational institution can designate certain information as directory information, and release this information without further to-do, provided the student consents in advance to such disclosure and other prerequisites are met. This law does not in any way prohibit the continuation of such practice; rather it prohibits the use of the directory information for commercial solicitation by persons or private entities. However, it does substantially reduce the value of a mailing list and it may cause some minor problems internally.

For example, each year Clemson provides lists of graduates to vendors of academic regalia, rings, graduation invitations, and academic regalia, among others. Obviously graduation exercises are essential for the proper fulfillment of the university's mission and the inability to provide timely services to graduate could seriously interfere with these ceremonies. Under FPPA, the vendors cannot use any such list for commercial solicitation. On the other hand, there is nothing in the law which would preclude the university itself notifying the graduates of the availability of these services, nor for that matter providing that notification pursuant to a contract with vendor. This could be included as part of the RFP or otherwise in the contract with the vendor. This of course assumes that the vendor is providing consumer goods and/or services deemed by the university to be integral to the complete and successful accomplishment of its

mission.

By the same token, the law would prohibit persons and private entities from using such information for commercial solicitation. Since 'private entity' is not defined, the question then arises as to the status of such organizations as IPTAY, the Alumni Association, the Interfraternity Council, the Madren Center, the Foundation, to mention a few. At first impression these would appear to be private entities and subject to the law. However, each of these is integrally and inextricably tied into the functioning of the university. It is difficult to conceive of these organizations as being truly private in view of their avowed purposes.[Moreover, if any public funds have been expended by or on behalf of these organizations or used in support of these organizations, they are considered 'public' organizations, at least for purposes of the Freedom of Information Act (Weston v. Carolina Research and Development Corporation (S.C. 1991), 303 SC 398, 401 SE2d 161).] Should these organizations solicit donations on behalf of the university, this would not seem to be commercial solicitation, as defined; gifts are obviously not a consumer product or service. On the other hand I have difficulty with any unit of the public agency providing mailing lists to third parties in exchange for compensation of any sort so that the third party could solicit the listed persons to purchase consumer goods or services from the third party.

Finally, we must come to grips with existing contracts. As I understand it, there is at least one on-going contract in Student Affairs, whereby Student Affairs signed a contract a year ago with a company that furnishes 'welcome baskets'. I'm not certain of the details at this point, but it appears to me that if we were furnishing names to this company we may no longer do so. However this may be one of those situations in which the university could furnish this information to the parent or guardian directly, provided the university considers this an essential part of the university's mission..